

Public Prosecutor v Entiran a/l Durasamy and other cases

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HIGH COURT (IPOH) — CRIMINAL APPLICATION
NOS AA-44-19-04 OF 2021, AA-44-20-04 OF 2021, AA-44-21-04 OF
2021, AA-44-22-04 OF 2021, AA-44-28-05 OF 2020, AA-44-30-05 OF
2020, AA-44-31-05 OF 2020 AND AA-44-36-06 OF 2020
SU TIANG JOO JC
2 NOVEMBER 2021

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Criminal Procedure — Bail — Non-bailable offence — Applicants charged with security offence — Whether provision allowing bail for women was unconstitutional — Whether court was functus officio — Whether there was jurisdictional omission enabling court to consider bail applications afresh — Whether applicants entitled to be considered for bail — Security Offences (Special Measures) Act 2012 s 13

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Constitutional Law — Legislation — Constitutionality — Whether provision allowing bail for women was unconstitutional — Whether discrimination was in breach of fundamental liberty of equality — Security Offences (Special Measures) Act 2012 s 13 & Federal Constitution art 8

E

Statutory Interpretation — Construction of statutes — Harmonious construction — Provision allowed women to be granted bail for security offence — Whether discriminatory against men — Whether word ‘women’ should include ‘men’ — Whether there was rational or reasonable classification or differentiation — Security Offences (Special Measures) Act 2012 s 13

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These were the eight applications by the accused (‘the applicants’) for bail before the High Court. The applicants, together with two others making a total of ten accused persons were severally charged under s 130V(1) of the Penal Code for being a member of an organised criminal group named ‘Kumpulan Viki Naidu’. The applicants’ application for bail was opposed by the public prosecutor (‘the respondent’) on the grounds that: (a) this was the second application of this sort, which rendered the court functus officio; and (b) the applicants did not qualify for bail pursuant to s 13 of the Security Offences (Special Measures) Act 2012 (Act 747) (‘the SOSMA’). The applicants, on the other hand, made a constitutional attack on s 13(2)(b) of the SOSMA, arguing that the subsection had unlawfully discriminated against men, and they were equally entitled to be considered for bail. The issues that arose for determination were, inter alia: (i) the constitutionality of s 13 of the SOSMA; and (ii) whether the court was functus officio.

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A **Held**, allowing the applications:

- (1) The court was not persuaded to follow the authority of *Saminathan a/l Ganesan v Public Prosecutor* [2020] 7 MLJ 681 that s 13 of the SOSMA was unconstitutional premised on the argument that art 121 of the Federal Constitution which provided the judicial power to grant bail had been taken away. Such power could be taken away as could be seen in the provisions of s 41B(1) of the Dangerous Drugs Act 1952 (Act 234) ('the DDA'). Instead, the court agreed with the principle enunciated by His Lordship, Collin Lawrence Sequerah J in the High Court case of *Suresh Kumar a/l Velayuthan v Public Prosecutor* [2020] 10 MLJ 549 that art 149(1)(f) of the Federal Constitution validated laws passed notwithstanding that it was inconsistent with any of the provisions of arts 5, 9, 10 or 13 and that the SOSMA and in particular s 13 thereof was valid and lawful (see paras 5 & 8).
- (2) Such discrimination where men are discriminated from being granted bail when such a right is given to women under s 13(2)(b) of the SOSMA went against the non-gender discrimination provision housed within the fundamental liberty of equality which was expressly provided in arts 8(1) and (2) of the Federal Constitution. To provide an interpretation that was in harmony with the supreme law housed within the Federal Constitution, the learned judicial commissioner was of the view that the word 'women' in s 13(2)(b) of the SOSMA included 'men'. Applying such a construction, the applicants who were all men should similarly be entitled to be considered for bail (see paras 9–10).
- (3) The failure of the earlier court to discuss and decide upon the issue of whether the applicants should similarly be entitled to bail like women under s 13(2)(b) of the SOSMA and should not be discriminated against in breach of art 8 amounted to a jurisdictional omission which was an exception to the *functus officio* rule enabling this court to consider afresh the applications for bail. Furthermore, the circumstances had changed since the earlier application for bail. The court ought not to cover its ears to the undisputed fact that our apex court, the Federal Court, had granted bail to a male applicant who was charged with a security offence listed under the First Schedule of the SOSMA and by reason of which s 13 of the SOSMA would apply (see paras 27–28 & 31).
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[Bahasa Malaysia summary]

- I Ini adalah lapan permohonan oleh tertuduh ('pemohon-pemohon') bagi ikat jamin di hadapan Mahkamah Tinggi. Pemohon-pemohon, bersama dua yang lain menjadikan jumlah keseluruhan sepuluh orang tertuduh didakwa secara berasingan di bawah s 130V(1) Kanun Keseksan kerana menjadi ahli kumpulan jenayah terancang bernama 'Kumpulan Viki Naidu'. Permohonan pemohon-pemohon bagi ikat jamin telah dibantah oleh pendakwa raya

(‘responden’) atas alasan bahawa: (a) ini adalah permohonan kedua seumpama ini, yang menjadikan mahkamah functus officio; dan (b) pemohon tidak layak untuk diikat jamin menurut s 13 Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012 (Akta 747) (‘SOSMA’). Pemohon-pemohon, sebaliknya, membuat tentangan perlembagaan ke atas s 13(2)(b) SOSMA, dengan alasan bahawa subseksyen tersebut telah mendiskriminasi lelaki secara tidak sah, dan bahawa mereka secara sama rata berhak untuk dipertimbangkan bagi diikat jamin. Isu-isu yang berbangkit untuk ditentukan adalah, antara lain: (i) perlembagaan s 13 SOSMA; dan (ii) sama ada mahkamah telah functus officio.

Diputuskan, membenarkan permohonan:

- (1) Mahkamah tidak diyakinkan untuk mengikut otoriti *Saminathan all Ganesan v Public Prosecutor* [2020] 7 MLJ 681 bahawa s 13 SOSMA adalah bercanggah dengan perlembagaan berdasarkan hujah bahawa perkara 121 Perlembagaan Persekutuan yang memperuntukkan kuasa kehakiman untuk membenarkan ikat jamin telah diambil. Kuasa tersebut hanya boleh diambil seperti yang dapat dilihat dalam peruntukan s 41B(1) Akta Dadah Berbahaya 1952 (Akta 234) (‘DDA’). Sebaliknya, mahkamah bersetuju dengan prinsip yang dinyatakan oleh Yang Arif, Collin Lawrence Sequerah J dalam kes Mahkamah Tinggi *Suresh Kumar all Velayuthan v Public Prosecutor* [2020] 10 MLJ 549 bahawa perkara 149(1)(f) Perlembagaan Persekutuan mengesahkan undang-undang yang diluluskan walaupun ia tidak konsisten dengan mana-mana peruntukan perkara 5, 9, 10 atau 13 dan bahawa SOSMA dan khususnya s 13 dengan itu adalah sah dan terpakai (lihat perenggan 5 & 8).
- (2) Diskriminasi sedemikian di mana lelaki didiskriminasi daripada dibenarkan ikat jamin apabila hak sedemikian diberikan kepada wanita di bawah s 13(2)(b) SOSMA adalah bertentangan dengan peruntukan diskriminasi bukan jantina yang terkandung dalam kebebasan asas kesamarataan yang diperuntukkan dengan jelas dalam perkara 8(1) dan (2) Perlembagaan Persekutuan. Untuk memberikan tafsiran yang selaras dengan undang-undang tertinggi yang terkandung dalam Perlembagaan Persekutuan, pesuruhjaya kehakiman yang bijaksana berpandangan bahawa perkataan ‘wanita’ dalam s 13(2)(b) SOSMA termasuk ‘lelaki’. Dengan menggunakan kesimpulan sedemikian, pemohon yang kesemuanya adalah lelaki juga berhak untuk dipertimbangkan diikat jamin (lihat perenggan 9–10).
- (3) Kegagalan mahkamah sebelumnya dalam membincangkan dan memutuskan isu sama ada pemohon juga berhak untuk diikat jamin seperti wanita di bawah s 13(2)(b) SOSMA dan tidak boleh didiskriminasikan dengan melanggar perkara 8 terjumlah kepada

- A ketiadaan bidang kuasa yang merupakan pengecualian kepada peraturan
functus officio yang membolehkan mahkamah ini mempertimbangkan
semula permohonan untuk ikat jamin. Tambahan pula, keadaan telah
berubah sejak permohonan ikat jamin sebelum ini. Mahkamah tidak
sepatutnya menutup telinganya kepada fakta yang tidak dipertikaikan
B bahawa mahkamah tertinggi kita, Mahkamah Persekutuan, telah
memberikan jaminan kepada pemohon lelaki yang didakwa atas
kesalahan keselamatan yang disenaraikan di bawah Jadual Pertama
SOSMA dan oleh sebab itu s 13 SOSMA adalah terpakai
C (lihat perenggan 27–28 & 31).]

Cases referred to

- Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Intervener)* [2004] 2 MLJ 257; [2004] 1 CLJ 701, FC (refd)
- D *Dato' Seri Anwar bin Ibrahim v PP* [1999] 1 MLJ 321; [1999] 1 CLJ 537, CA (refd)
- Datuk Hj Harun bin Hj Idris v PP* [1977] 2 MLJ 155; [1976] 1 LNS 100, FC (refd)
- Goh Leong Yong v ASP Khairul Fairoz bin Rodzuan & Ors* [2021] 5 MLJ 474; [2021] 8 CLJ 331, FC (folld)
- E *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57; [1997] 2 CLJ 104, CA (folld)
- Jamaluddin bin Mohd Radzi & Ors v Sivakumar a/l Varatharaju Naidu (claimed as Yang Dipertua Dewan Negeri Perak Darul Ridzuan), Election Commission, intervener* [2009] 4 MLJ 593; [2009] 4 CLJ 347, FC (refd)
- F *Jimmy Seah Thian Heng & Ors v PP* [2019] 7 MLJ 308; [2018] 9 CLJ 769, HC (folld)
- Kanagasingam a/l Anantham v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 4 MLJ 103; [2019] 7 CLJ 600, CA (refd)
- G *Koh Chin Wah v Public Prosecutor* Criminal Application No 07–13–11 of 2019 (W) (unreported), FC (refd)
- Malaysian Motor Insurance Pool v Tirumeniyar a/l Singara Veloo* [2020] 1 MLJ 440; [2019] 10 CLJ 731, FC (refd)
- Md Nasir Uddin v PP* [2021] 11 MLJ 448; [2021] 6 CLJ 105, HC (refd)
- H *Milan Auto Sdn Bhd v Wong Seh Yen* [1995] 3 MLJ 537; [1995] 4 CLJ 449, FC (refd)
- Muraly a/l Subramaniam v PP* [2021] MLJU 939; [2021] 7 CLJ 794, HC (refd)
- Ong Ah Chuan v PP; Koh Chai Cheng v PP* [1981] 1 MLJ 64; [1980] 1 LNS 181, PC (refd)
- I *Pendakwa Raya lwn Nasrun Effendi* [2008] 4 MLJ 272; [2009] 3 CLJ 388, HC (refd)
- PP v Khong Teng Khen & Anor* [1976] 2 MLJ 166, FC (folld)
- PP v Chew Siew Luan* [1982] 2 MLJ 119; [1982] CLJ 285, FC (refd)

- PP v Mohd Radzi Bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd) **A**
- Raman a/l Shunmugham lwn Pendakwa Raya* [2020] 2 MLJ 675; [2020] 2 CLJ 818; [2019] 1 LNS 896, CA (refd)
- Saminathan a/l Ganesan v PP* [2020] 7 MLJ 681; [2020] 3 CLJ 398, HC (not folld) **B**
- Suresh Kumar a/l Velayuthan v PP* [2020] 10 MLJ 549; [2020] 4 CLJ 270, HC (folld)
- Tamil Selven a/l Letchumenan v Pendakwa Raya* [2019] MLJU 1123; [2019] 1 LNS 1542, CA (refd)
- Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor* [2000] 1 MLJ 479; [2000] 1 CLJ 553, CA (refd) **C**
- Velmurugan a/l Paniresilvam v PP* [2020] MLJU 1965, HC (refd)
- Vishnu a/l Telagan v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 6 MLJ 1; [2019] 9 CLJ 177, FC (refd) **D**

Legislation referred to

- Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 s 26A, Part IIIA
- Criminal Procedure Code ss 278, 388(1)
- Dangerous Drugs Act 1952 ss 41B(1), (1)(a), (1)(b), (1)(c) **E**
- Federal Constitution arts 5, 8, 8(1), (2), 9, 10, 13, 121, 121(1), 149, 149(1)(f), 160(2)
- Penal Code s 130V(1), Chapters VI, VIA, VIB
- Security Offences (Special Measures) Act 2012 ss 13, 13(2), (2)(b), First Schedule **F**
- Special Measures Against Terrorism in Foreign Countries Act 2015
- Mohd Sabri bin Othman (Nur Ainaa bt Ridzwan and Adip Sabir Abdullah with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.* **G**
- Noorfariah bt Arshad (Nurul & Charan) for the first, second and fourth accused.*
- Ashok Athimulan (Noorfariah Arshad with him) (Nurul & Charan) for the third accused.*
- Nahtan s/o N Krishnan (Naht, Guna & Partners) for the fifth, sixth, seventh and eighth accused.* **H**

Su Tiang Joo JC:

INTRODUCTION

[1] There are eight applications for bail before the High Court ('court'). The public prosecutor who is the respondent in all eight applications opposes all the applications on the following grounds:

- (a) this is the second application; and

- A (b) the applicants do not qualify for bail pursuant to s 13 of the Security Offences (Special Measures) Act 2012 (Act 747) ('the SOSMA').

BACKGROUND

- B [2] Each of the eight applicants together with two others making a total of ten accused persons are severally charged under s 130V(1) of the Penal Code for being a member of an organised criminal group named 'Kumpulan Viki Naidu'. Section 130V(1) provides that whoever is a member of an organised criminal group shall be punished with imprisonment for a term of not less than five years and not more than twenty years. Although severally charged, they are being tried together and their joint trial is currently ongoing.

COURT'S ANALYSIS AND FINDINGS

- D [3] The court will deal with each of the assertions put forward by the applicants and the respondent in no particular order.

Constitutionality of s 13 of the SOSMA

- E [4] The provisions of s 13 of the SOSMA are reproduced below:
- (1) Bail shall not be granted to a person who has been charged with a security offence.
- F (2) Notwithstanding subsection (1) —
- (a) a person below the age of eighteen years;
- (b) a woman; or
- G (c) a sick or an infirm person,
- charged with a security offence, other than an offence under Chapter VIA of the Penal Code [Act 574] and the Special Measures Against Terrorism in Foreign Countries Act 2015 [Act 770], may be released on bail subject to an application by the Public Prosecutor that the person be attached with an electronic monitoring device in accordance with the Criminal Procedure Code.

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- I [5] With all due respect, the court is not persuaded to follow the authority of *Saminathan a/l Ganesan v Public Prosecutor* [2020] 7 MLJ 681; [2020] 3 CLJ 398 (HC) that s 13 of the SOSMA is unconstitutional premised on the argument that art 121 of the Federal Constitution which provides the judicial power to grant bail has been taken away. Such power can be taken away as can be seen in the provisions of s 41B(1) of the Dangerous Drugs Act 1952 (Act 234) ('the DDA'), which I will discuss further below.

[6] On a related note, on the separation of powers and basic structure doctrine argument raised by Mr Charan Singh, the former lead counsel for (a) Ganesan a/l Durasamy; (b) Velmurugan a/l Paniresilvam; (c) Entiran a/l Durasamy; and (d) Ganasen a/l Kupusamy that judicial power including that to grant bail cannot be taken away and although the Federal Court would probably have to revisit this issue arising from its decision in *Koh Chin Wah v Public Prosecutor* and the decision of the Court of Appeal in *Tamil Selven all Letchumanan v Pendakwa Raya* [2019] MLJU 1123, this court is bound by the latest Federal Court decision in *Goh Leong Yong v ASP Khairul Fairoz bin Rodzuan & Ors* [2021] 5 MLJ 474; [2021] 8 CLJ 331, which rejected such argument, and I quote the following excerpt from the majority decision handed down by Her Ladyship, Zabariah Mohd Yusof FCJ:

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[88] On the basic structure doctrine, the majority judgments in *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750; [2021] 2 CLJ 579, *Rovin Joty all Kodeeswaran v Lembaga Pencegahan Jenayah & Ors and other appeals* [2021] 2 MLJ 822; [2021] 4 CLJ 1; [2021] 3 MLRA 260 and *Zaidi Kanapiyah* have addressed this doctrine extensively by referring to the judgment of the learned Raja Azlan Shah FJ in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187; [1975] 1 LNS 90 and Suffian LP in *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70; [1979] 1 LNS 67, which had consistently rejected the doctrine. It is already settled that [the] basic structure doctrine has no place in our jurisprudence. Therefore, I will not dwell on it in this judgment.

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[7] I also quote the following excerpts from the judgment of His Lordship, Abdul Rahman Sebli FCJ who wrote the supporting judgment in *Goh Leong Yong v ASP Khairul Fairoz bin Rodzuan & Ors* [2021] 5 MLJ 474:

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[140] ... To remove judicial power from the two High Courts means to take away judicial power from the two High Courts and leaving them with no judicial power to exercise.

[141] That cannot be factually correct. Judicial power has never been removed from the two High Courts and will remain vested in the two High Courts for as long as art 121(1) is still embedded in the Constitution ...

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[143] The truth is, judicial power has never been removed from the two High Courts at any time either before or after the amendment to art 121(1). The removal of judicial power from the two High Courts can only be done by removing the whole of art 121(1) from the Constitution, and not merely by removing those few words from the article although, admittedly, they are words of significant import.

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[8] Instead, this court agrees with the principle enunciated by His Lordship Collin Lawrence Sequerah J in the High Court case of *Suresh Kumar all Velayuthan v Public Prosecutor* [2020] 10 MLJ 549; [2020] 4 CLJ 270 (HC) that art 149(1)(f) of the Federal Constitution validates laws passed notwithstanding that it is inconsistent with any of the provisions of arts 5, 9, 10 or 13 and that the SOSMA and in particular s 13 thereof is valid and lawful.

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A [9] However, with respect, where I differ is when men are discriminated from being granted bail when such a right is given to women under s 13(2)(b) of the SOSMA. Such discrimination goes against the non-gender discrimination provision housed within the fundamental liberty of equality which is expressly provided in arts 8(1) and (2) of the Federal Constitution as reproduced below:

B 8(1) All persons are equal before the law and entitled to the equal protection of the law.
C (2) *Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.* (Emphasis added.)

D [10] By reason thereto, so as to provide an interpretation that is in harmony with the supreme law housed within the Federal Constitution, in my view, the word ‘women’ in s 13(2)(b) of the SOSMA includes ‘men’. Applying such a construction, the applicants who are all men should similarly be entitled to be considered for bail. See the Federal Court decision of *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Intervener)* [2004] 2 MLJ 257; [2004] 1 CLJ 701, where Augustine Paul JCA (who retired as FCJ) in delivering the judgment of the Federal Court said:

F If art 160(2) is not interpreted together with s 3(1) it would render the section otiose in so far as its power to modify the common law in the future is concerned. This will militate against *one of the recognised canons of construction of a Constitution which is that if two constructions are possible the court must adopt the one which will ensure the smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well-established provisions of existing law nugatory* (see *State of Punjab v Ajaib Singh* AIR [1953] SC 10). (Emphasis added.)

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H [11] In opposing the applications for bail, the respondent relied upon the case of *Public Prosecutor v Khong Teng Khen & Anor* [1976] 2 MLJ 166, where the Federal Court held that the law may classify persons into children, juveniles and adults and provide different criteria for determining liability or the mode of trying them or punishing them if found guilty. And, that the law may classify persons into women and men, or into wives and husbands, and provide different rights and liabilities attaching to the status of each class. The case of *Datuk Hj Harun bin Hj Idris v Public Prosecutor* [1977] 2 MLJ 155; [1976] 1 LNS 100 (FC) was also cited where it was held that discriminatory law is good law if it is based upon reasonable or permissible classification or founded on intelligible differentia.

[12] However, with respect, in my view there is no intelligible differentia as to why men should not be allowed bail when women are allowed bail under s 13(2)(b) of the SOSMA when charged for a security offence, the security offence in this case being an offence under s 130V(1) of the Penal Code. Such a blanket exception in favour of women is discriminatory against men. Women are as equally capable of committing security offences under the SOSMA as men. Such discrimination, to my mind, would not qualify as a rational or reasonable classification or differentiation. Indeed, to drive home the point, there is no provision at all in the SOSMA that women cannot be charged for any security offences under this Act. The very fact that there is a provision for bail for women under s 13(2)(b) of the SOSMA would logically drive anyone to conclude that women are capable of committing security offences and are equally liable to be charged for the same.

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[13] I am aware that this would result in there being no distinction to be drawn between women and men when granting bail and the answer lies in art 8 of the Federal Constitution.

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[14] The Constitution (Amendment) (No 2) Act 2001 (Act A1130), which came into force on 28 September 2001 made amendments, inter alia, to art 8(2) of the Federal Constitution by introducing the word 'gender'. Wherefore, with respect, in my view, the law that flows from the cases that were decided prior to 28 September 2001, such as *Public Prosecutor v Khong Teng Khen & Anor* and *Datuk Hj Harun bin Hj Idris v Public Prosecutor*, which were relied upon by the respondent must be distinguished and applied with great circumspection. For ease of reference, s 3 of the Constitution (Amendment) (No 2) Act 2001 (Act A1130) is reproduced below:

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The Federal Constitution is amended in Article 8 in Clause (2) by substituting for the words 'descent or place of birth' the words 'descent, place of birth or gender'. (Emphasis added.)

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[15] I observed that the non-gender discrimination provision housed in art 8 of the Federal Constitution were not canvassed in the authorities relied upon by the respondent, such as *Suresh Kumar all Velayuthan v Public Prosecutor* [2020] 10 MLJ 549; [2020] 4 CLJ 270 (HC) and *Md Nasir Uddin v Public Prosecutor* [2021] 11 MLJ 448; [2021] 6 CLJ 105 (HC) in support of the bail applications which were dismissed.

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[16] In a similar vein, the debate in Parliament as shown by Hansard did not seem to touch on this aspect on why the right to be considered for bail is given to women but not to men.

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[17] Just like in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council*

- A *Malaysia, Intervener*) [2004] 2 MLJ 257; [2004] 1 CLJ 701, where the Federal Court referred to *Ong Ah Chuan v Public Prosecutor*; *Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64; [1980] 1 LNS 181, where Lord Diplock stated: 'Equality before the law and equal protection of the law require that like should be compared with like ...'. I observe that there is no distinction regarding the offences under the SOSMA on whether they are offences that may be committed by different kinds of gender so as to be visited by different types of punishment.
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- C [18] The security offences listed in the First Schedule of the SOSMA are offences under Chapters VI (Offences Against the State); VIA (Offences Relating to Terrorism); and VIB (Organised Crime) of the Penal Code; Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (Act 670) (offences under Part IIIA on Smuggling of Migrants); and Special Measures Against Terrorism in Foreign Countries Act 2015 (Act 770).
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- E [19] It is pertinent to observe that the SOSMA is a law enacted pursuant to art 149 of the Federal Constitution and where such law is valid notwithstanding that it may be inconsistent with any of the provisions of the fundamental liberties enshrined in arts 5, 9, 10 or 13 of the Federal Constitution (the class of 'excluded fundamental liberties') but significantly, the fundamental liberty of equality under art 8 of the Federal Constitution is not included in the class of excluded fundamental liberties. This intentional omission drives me to hold that the laws made under art 149 cannot be inconsistent with the fundamental right of equality enshrined in art 8. Such an omission clearly does not make it fall within the qualifying provision of art 8, which provides 'except as expressly authorized by the Constitution'. And seeing that art 8 is housed within Part II on fundamental liberties of the Federal Constitution together with arts 5, 9, 10 and 13, it would be apt to also apply the maxim *expressio unius est exclusio alterius* (when one or more things of a class are expressly mentioned, others, of the same class are excluded) (see para [26] of the Federal Court decision of *Jamaluddin bin Mohd Radzi & Ors v Sivakumar a/l Varatharaju Naidu (claimed as Yang Dipertua Dewan Negeri Perak Darul Ridzuan), Election Commission, intervener* [2009] 4 MLJ 593; [2009] 4 CLJ 347) and this court ought to construe the law enacted under art 149 to be in harmony with the fundamental liberty provisions of equality under art 8.
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- I [20] I draw further support for such a construction from s 41B(1) of the DDA, which provides a blanket restriction on bail irrespective of the gender of the accused. This means that bail is not to be granted to an accused person charged with an offence under the DDA as stated below:

(1) ...

- (a) where the offence is punishable with death; or

- (b) where the offence is punishable with imprisonment for more than five years; or
- (c) where the offence is punishable with imprisonment for five years or less and the Public Prosecutor certifies in writing that it is not in the public interest to grant bail to the accused person.

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[21] In ss 41B(1)(a), (1)(b), and (1)(c) of the DDA, there is no gender discrimination against the restriction on bail, see *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119; [1982] CLJ 285, where Raja Azlan Shah CJ Malaya (as His Majesty then was) delivering the judgment for the Federal Court denied bail to the appellant, a woman who was then pregnant. Even a sick or infirm person would not be amenable to bail, see *Muraly all Subramaniam v Public Prosecutor* [2021] MLJU 939; [2021] 7 CLJ 794 (HC), where the accused was charged with drug trafficking and if convicted would have faced the death penalty was denied bail even though he was suffering from end-stage renal failure.

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[22] However, in s 13(2)(b) of the SOSMA there is a relaxation on bail for a security offence where it allows women who may be charged under s 130V(1) of the Penal Code to be amenable to bail despite it being a security offence under the SOSMA. On this ground, I find that men should not be discriminated against and should similarly be entitled to be considered for bail depending on the circumstances of the case, ie on a case-by-case basis, for example, whether the applicant is a flight risk.

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[23] On the two articles relied upon by the respondent namely: (a) *Report no 48 Releasing the Female Accused on Bail* by Law and Justice Commission of Pakistan; and (b) *Women and Detention* published by Women Human Rights and Gender Section, OHCHR Rule of Law, Equality and Non Discrimination Branch, to support its assertion on why an accused who is a woman should be allowed bail by highlighting the difficulties encountered by females in prison; one of which discusses the conditions of the prisons in Pakistan, with due respect, I do not find them helpful in assisting the court because there is no evidence before the court to safely conclude that the conditions of the prisons in Malaysia for women are worse off compared to the prisons for men so as to justify that women who are accused of security offences under the SOSMA are entitled to rights such as bail to which men are deprived of. The fallacy of the respondent's argument is exposed when tested against logic, *cessante ratione legis cessat ipsa lex* (reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself). Taken to its logical conclusion, the respondent's argument would suggest that women should not be incarcerated at all. However, there is no law which excuses women from being sentenced to imprisonment purely on the ground of gender. Therefore, the argument that a particular gender can be allowed bail prior to a finding of conviction but

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- A another gender cannot, flies in the face of the fundamental liberty provision of equality.

Functus officio and res judicata

- B [24] The respondent has pointed out that these applications before the court is the second of such applications made by the applicants. The question that this court is now faced with is ‘is the court functus officio?’

- C [25] In *Pendakwa Raya lwn Nasrun Effendi* [2008] 4 MLJ 272; [2009] 3 CLJ 388 (HC), His Lordship, Mohd Zawawi Salleh PK (now FCJ) made reference to s 278 of the Criminal Procedure Code (Act 593) (‘the CPC’) which provides that ‘no court, other than a High Court, having once recorded its judgment, shall alter or review the same ...’. See also *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57; [1997] 2 CLJ 104 (CA).

- E [26] However, there are exceptions to the res judicata rule which encompasses the functus officio rule, see *Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor* [2000] 1 MLJ 479; [2000] 1 CLJ 553 (CA). The exception which is relevant to this case would be where the tribunal or the court (often inadvertently) did not fully carry out all the basic functions which were its duty to perform, so that it can be said that some fundamental function remains unfulfilled and which amounts to jurisdictional error, see *Milan Auto Sdn Bhd v Wong Seh Yen* [1995] 3 MLJ 537; [1995] 4 CLJ 449 (FC).

- F [27] In the earlier application for bail by all ten accused, His Lordship, Mohd Radzi Harun J who heard six of the applications had granted bail to V Vigneswaran Naidu a/l Venkatararema Naidu who was one of the ten accused on the grounds that he is a sick and infirm person. However, another accused who had also applied for bail on the same grounds together with other grounds, had his application dismissed, see *Velmurugan a/l Paniresilvam v Public Prosecutor* [2020] MLJU 1965 (HC). The other grounds relied upon by Velmurugan were that as follows: (a) he is innocent until proven guilty and should be entitled to bail consonant with art 8 of the Federal Constitution; and
- G (b) the SOSMA charge is without merit as the applicant was suspected of being involved in drug-related activities which do not come under the definition of security offences under the SOSMA and under s 388(1) of the CPC, where the court is still empowered to grant bail to a non-bailable offence. Notably, the issue of whether the applicant who is a man should similarly be entitled to bail like women under s 13(2)(b) of the SOSMA and should not be discriminated against in breach of the fundamental liberty provision encapsulated in art 8 was not (Emphasis added.) discussed and decided upon. Instead, on the premise that the applicant does not come within the three categories of persons under s 13(2)(b) of the SOSMA, bail was denied with reference made to *Raman a/l*
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Shunmugham lwn Pendakwa Raya [2020] 2 MLJ 675; [2020] 2 CLJ 818; [2019] 1 LNS 896 (CA). This, to my mind, with the greatest of respect, amounts to a jurisdictional omission which would be an exception to the functus officio rule enabling this court to consider the fresh applications before this court. In other words, from the facts of this case, the exception to the functus officio rule applies and this court is at liberty to hear these fresh applications for bail.

[28] There is a further reason, that is, the circumstance has changed since the earlier application for bail. To the credit of the team of learned DPPs, they candidly admitted that in *Koh Chin Wah v Public Prosecutor* Criminal Application No 07–13–11 of 2019 (W) (unreported) (the case number was supplied by the learned DPPs in their written submissions in E13 under subheading (vi) and para 119) bail was given by the Federal Court to a man charged for carrying out smuggling of migrants under s 26A of the Anti-Trafficking in Persons and Anti- Smuggling of Migrants Act 2007(Act 670), which is a security offence under the First Schedule of the SOSMA.

[29] However, the prosecution submitted that the decision in *Koh Chin Wah* is not binding on this court because no grounds of judgment have been handed down by the Federal Court with reliance placed upon *Kanagasisingam all Anantham v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 4 MLJ 103; [2019] 7 CLJ 600 (CA), *Malaysian Motor Insurance Pool v Tirumeniyar all Singara Veloo* [2020] 1 MLJ 440; [2019] 10 CLJ 731 (FC) and *Vishnu all Telagan v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 6 MLJ 1; [2019] 9 CLJ 177 (FC).

[30] By analogy to the principle laid down in the celebrated case of *Public Prosecutor v Mohd Radzi Bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457, where the Federal Court stated that ‘if the prosecution’s evidence admits of two or more inferences, one of which is in the accused’s favour, then it is the duty of the court to draw the inference that is favourable to the accused’. By a similar analogy where a decision of the Federal Court admits of two or more inferences, one of which is in favour of the accused, then it is the duty of this court to draw an inference that favours the accused, especially when a decision on bail may not be amenable to appeal, see *Dato’ Seri Anwar bin Ibrahim v Public Prosecutor* [1999] 1 MLJ 321; [1999] 1 CLJ 537 (CA).

[31] Although no grounds of judgment were given by the Federal Court in *Koh Chin Wah v Public Prosecutor*, this court ought not to cover its ears to the undisputed fact that our apex court, the Federal Court, had granted bail to a male applicant who was charged with a security offence listed under the First Schedule of the SOSMA and by reason of which s 13 of the SOSMA

- A would apply. It can be safely inferred from this decision of the Federal Court that the court has the jurisdiction and power to grant bail to a male person charged with a security offence listed under the First Schedule of the SOSMA although he may not be in the categories of persons amenable to bail under s 13(2) of the SOSMA. Wherefore, with all due respect to the respondent, this
- B court would draw an inference favourable to the applicants based on the decision of the Federal Court in *Koh Chin Wah v Public Prosecutor*, where the panel of judges consisting of the Chief Justice, the President of the Court of Appeal and a very senior Federal Court judge, Vernon Ong FCJ presided over the case.

C
CONCLUSION

- [32] Wherefore, I am of the opinion that the applicants are entitled to be considered for bail and it has been held in *Tamil Selven a/l Letchumanan v Pendakwa Raya* [2019] MLJU 1123; [2019] 1 LNS 1542 (CA), where His Lordship, Abdul Rahman Sebli JCA (now FCJ) in delivering the judgment of the Court of Appeal said at para [11]:
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- E ... that notwithstanding the absence of such application by the public prosecutor, the courts are still vested with the discretion to grant or not to grant bail to any of the classes of persons enumerated in s 13(2) of the SOSMA.

- [33] Having decided that men are equally entitled to the right to be considered for bail, and guided by the case of *Jimmy Seah Thian Heng & Ors v Public Prosecutor* [2019] 7 MLJ 308; [2018] 9 CLJ 769 (HC), where His Lordship, Collin Lawrence Sequerah J held that courts can impose whatever conditions of bail deemed fit, I will now consider the same. In this regard, I then called upon the learned deputy public prosecutor ('DPP') and learned counsel for the applicants to address the court on why in the particular
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- G circumstance of each applicant, save and except purely on the ground of gender, bail ought to be denied and if allowed, the proposed terms to be imposed for bail.

BAIL

- H [34] After hearing the learned DPP and learned counsel for the applicants, the court grants bail of RM30,000 for each applicant and the following conditions apply:

- I (a) to provide two local sureties;
- (b) the applicant must be attached with an Electronic Monitoring Device ('EMD');
- (c) the applicant's passport and all travelling papers are to be surrendered to the court;

- (d) the applicant must not communicate in any way whatsoever including but not limited to communication in person, by telephone, email, Whatsapp or by any social media, with any of the witnesses of the joint trial herein and this include any family members of the witnesses until the disposal of the trial; A
- (e) the applicant must report to the police station nearest to his home at least once a week until he is discharged and acquitted or until further order by the court; and B
- (f) the EMD that is to be attached to the leg of each of the applicant is subject to the following conditions: C
 - (i) the movements of each of the applicants are to be recorded and kept as part of official records;
 - (ii) the applicants are required to report, if required, on the condition of the EMD; D
 - (iii) an applicant who changes his residence is to notify the nearest police station of his new address;
 - (iv) the applicants must comply with any procedure on the use of the EMD as may be set by a police officer; E
 - (v) each applicant must allow any police officer to inspect the EMD affixed to him and to report to the nearest police station for the process of removing and returning the EMD in good condition to a police officer as and when required; and F
 - (vi) the applicants must comply with any directions as may be given by the court.

Applications allowed.

Reported by K Selvaraju

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